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No. 00-6677

In the Supreme Court of the United States

Supreme Court, U.S.
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JOHNNY PAUL PENRY,

Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

**IMMINENT EXECUTION SCHEDULED
FOR NOVEMBER 16, 2000**

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CAPITAL CASE

QUESTIONS PRESENTED

1. Is the Court of Appeals decision, which approved the repetition of the same procedure condemned as unconstitutional in Penry I, in conflict with Penry I and other relevant decisions of this Court?

2. Is a psychiatrist appointed by the Court on motion of defense counsel, whose report is used as evidence for the prosecution, an "agent of the state" for purposes of the Fifth Amendment holding of Estelle v. Smith?

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Johnny Paul Penry respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of petitioner's application for a writ of habeas corpus and Judge Dennis's dissenting opinion are reported at 215 F.3d 504 and attached hereto as Appendix A. The opinion of the Court of Appeals denying Penry's petitions for rehearing and rehearing *en banc* is not reported and is attached hereto as Appendix C. The opinion of the United States District Court for the Southern District of Texas denying Penry's habeas petition is not reported and is attached hereto as Appendix B. The opinion of the district court denying Penry's motion to alter and amend the judgment can be found at Appendix D.

JURISDICTION

On June 20, 2000, the Court of Appeals entered judgment affirming the district court's denial of petitioner's application for habeas corpus. By order filed July 25, 1999, the Court of Appeals denied Penry's petitions for rehearing and rehearing *en banc*. See App. at C. This petition is being timely filed within 90 days of that order. This Court's jurisdiction rests on 28 U.S.C. § 1254(1). Petitioner first invoked federal court jurisdiction in this case under 28 U.S.C. § 2254.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

This case involves the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. The text of these Amendments is set forth in Appendix E. This

case also involves current and former Tex. Crim. Proc. Code Art. 37.071 and Tex. Crim. Proc. Code Art. 35.22. The text of these statutes can be found in Appendix L.

STATEMENT OF THE CASE

Summary of Issues Raised

This case involves the refusal of the Texas courts to abandon a practice condemned as unconstitutional in Penry v. Lynaugh, 492 U.S. 302 (1989) ("Penry I") because it put unacceptable limitations on the ability of a jury to give effect to mitigating evidence.

Penry I is the prior decision by this Court in this case, in which the Court held that the jury had been unconstitutionally precluded from giving effect to evidence of Penry's mental retardation and organic brain damage, and of the horrifying abuse he suffered as a child. Specifically, the Court held that the then existing Texas statutory scheme, which limited the consideration of mitigating evidence to the context of three "special issues," produced an unconstitutional result when applied to Penry.

On retrial, the Texas court, in violation of Penry I, submitted the same three special issues to the jury, giving the jury no opportunity, except through answers to the special issues, to give effect to the mitigating evidence.[1]

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[1] As a result of Penry I, the Texas statutory scheme has been changed. A capital jury must now answer an additional "special issue" that expressly addresses mitigating evidence. At Penry's second trial, however, the new statute was not yet in effect. See App. L, Tex. Crim. Proc. Code Art. 37.071.

While Penry's jurors were instructed to consider that evidence, they were told they could only do so when answering the three special issues that Penry I held constitutionally inappropriate. Penry's jurors were given the following instruction:

> If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability *at the time you answer the special issue*. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, *as reflected by a negative finding to the issue under consideration*, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, *a negative finding should be given to one of the three special questions*.

Therefore, the jurors were instructed, in violation of Penry I, that they could only give effect to the mitigating evidence, and grant Penry a life sentence, if they found that the evidence of Penry's history of mental retardation and child abuse somehow fit under the three special questions. The only other way for the jurors to have given effect to this evidence would have been for them to disregard their oaths as jurors and answer "no" to one of the special issues even if the evidence supported an answer of "yes." This charge does not satisfy the requirements of the Eighth and Fourteenth Amendments to the Constitution and, therefore, is blatantly unconstitutional under Penry I.

Because of Penry, all capital defendants in Texas now have the benefit of a "Penry" instruction. Yet, Penry himself was deprived of such an instruction at his own re-trial. Penry appears before this Court to vindicate his constitutional right to have a jury give effect to those aspects of his character and background that would spare him from the ultimate punishment.

The jury charge was not the only error of constitutional magnitude at Penry's trial; the trial was infected by a psychiatric report admitted in blatant violation of Penry's rights under Estelle v. Smith, 451 U.S. 454 (1981). Several years before the trial in this matter, while Penry was in custody for an unrelated crime, he was subjected to a court-ordered psychiatric examination. Penry was not in custody for a capital offense at that time, and thus did not receive the constitutionally mandated warnings concerning the possible use of his statements against him at the penalty phase of a future trial for his life. Despite this, and over strenuous defense objections, this report was admitted into evidence, and heavily relied on by the prosecution, at his capital trial as proof of "future dangerousness." This use of Penry's statements was a clear violation of the Fifth Amendment as interpreted in Estelle.

These facts raise serious constitutional questions that merit this Court's consideration.

Procedural Background

After his original death sentence was vacated by this Court in Penry I, Penry was retried in 1990 in Walker County, Texas. On July 9, 1990, a jury found Penry guilty of capital murder. He was sentenced to death on July 17, 1990. Appeal was automatic to the Texas Court of Criminal Appeals, which affirmed the conviction and sentence on February 22, 1995 and denied rehearing on June 7, 1995. Penry v. State, 903 S.W.2d 715 (Tex. Crim App. 1995). The Supreme Court denied Penry's petition for a writ of certiorari on November 13, 1995, Penry v. Texas, 516 U.S. 977 (1995), and denied a motion for rehearing on January 8, 1996. Penry v. Texas, 516 U.S. 1069 (1996).

On October 23, 1996, Penry filed his initial Application for a Writ of Habeas Corpus with the 258th district court of Polk Count which was denied on September 23, 1997. The Texas Court of Criminal Appeals denied relief without opinion on December 3, 1997.

On March 2, 1998 Penry first sought federal jurisdiction by filing a Petition for a Writ of Habeas Corpus in the district court pursuant to 28 U.S.C. § 2254. The State filed a motion for Summary Judgment on March 16, 1998 which Penry opposed on April 7, 1998. On March 30, 1999, the district court denied the petition and denied Penry a Certificate of Appealability. On April 9, 1999 Penry filed a Motion to Alter and Amend the Judgment which was denied on August 13, 1999.

On November 8, Penry filed an Application for a Certificate of Appealability in the United States Court of Appeals for the Fifth Circuit that raised four issues for review. Oral argument was heard on February 10, 2000. The Application was denied and the opinion of the district court affirmed on June 20, 2000. On July 5, 2000, Penry filed Petitions for Panel Rehearing and Rehearing *en banc*, both of which were denied on July 25, 2000.

REASONS FOR GRANTING THE PETITION

I.

THE OPINION OF THE COURT OF APPEALS APPROVES THE ERROR CONDEMNED IN *PENRY I*

The Fifth Circuit decided the question before it "in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c). Specifically, the opinion of the Panel majority conflicts with Penry I, and the decisions on which it was based, including Hitchcock v. Dugger, 481 U.S. 393, 394 (1987), Skipper v. South Carolina, 476 U.S. 1, 4 (1986), Eddings v. Oklahoma, 455 U.S. 104, 113-114 (1982), Lockett v. Ohio, 438 U.S. 586, 604 (1978). These decisions all stand for the basic principle that "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." Weeks v. Angelone, ___ U.S. ___ 120 S. Ct. 727, 732 (2000).

The decision below demonstrates a need for this Court to reaffirm the holding of Penry I that, while a court may structure a jury's consideration of mitigation evidence, it may not restrict the jury's ability to give effect to such evidence.

A. The Trial Court's Instruction Contained the Same Constitutional Infirmity that Required Reversal by this Court in Penry I.

1. Penry I

In 1989, this Court held in Penry I that the Texas capital sentencing regime limited the ability of the jury at Penry's trial to give effect to only that mitigating evidence that was relevant to the three "special questions" then in effect under Texas' capital statute.[2/]

[2/] The Texas State Legislature, in response to the Supreme Court's decision in Penry I, re-wrote the capital statute, but not in time for Penry's re-trial. Today, Texas capital jurors are asked (continued...)

The problem, as this Court articulated it, was that jurors were not able under the Texas regime to give effect to powerful mitigating evidence such as the defendant's mental retardation and history of child abuse because the statute focused their sentencing decision away from these considerations.

In determining whether a defendant should live or die, the Texas statute in effect at Penry's first -- and second -- trial asked jurors to answer three questions:

> i) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased or another would result;
>
> ii) whether there is a reasonable probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> iii) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex. Crim. Proc. Code Art. 37.071, App. L.

Factors such as mental retardation and child abuse are not relevant to, and thus can not be considered under, these three questions. As this Court explained, evidence of mental retardation and severe child abuse are "beyond the scope of [the first special issue]" (concerning the defendant's deliberateness); are relevant to the second special issue

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[2/] (...continued)
four, not three, questions, and the fourth question pertains directly to mitigation. It asks "whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is still sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." Tex. Crim. Proc. Code Art. 37.071 (Vernon Supp. 2000). This is the precisely the sort of instruction to which Penry was constitutionally entitled.

(concerning future dangerousness) only as an *aggravating* factor, and they simply have no bearing on the third special issue (victim's provocation). Penry I, 492 U.S. at 322-25. This Court thus concluded in Penry I that confining the jury's ability to dispense mercy based on negative answers to these three questions unconstitutionally prevents the jury from giving effect to powerful testimony that could otherwise save a defendant's life. On this ground, Penry's first death sentence was reversed.[3]

2. The Instruction at Penry's Second Trial Repeated the Error That Mandated Reversal in Penry I.

Notwithstanding this Court's clear holding in Penry I, the court that re-tried Penry following reversal did not correct the constitutional violation that generated the retrial. Rather, the jurors were once again unconstitutionally instructed that their consideration of the mitigating evidence must be limited to the three special questions. The trial court instructed the jury as follows:

> If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability *at the time you answer the special issue*. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, *as reflected by a negative finding to the issue under consideration*, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, *a negative finding should be given to one of the three special questions*.

The jury then retired to deliberate with a verdict form consisting of only the three special questions -- a form identical to the one found unconstitutional in Penry I.

The jury charge and verdict form given by the trial court fall prey to the same constitutional infirmity as the instructions that mandated reversal by this Court in Penry I. Three times the instruction draws the jurors back to the same special questions that this Court unequivocally held would not allow consideration of mental retardation and child abuse as mitigating factors. The charge tells the jury that the mitigation testimony should be considered "at the time you answer the special issue" -- something that this Court expressly held was impossible. Then, most pointedly, the instruction tells jurors that in order to determine whether "a life sentence" is "an appropriate response to the personal culpability of the defendant," the life sentence must be "*reflected by a negative finding*" to one of the three questions. Once more, the trial court's charge asked the jury to circumscribe their consideration of mental retardation and other mitigating evidence to the determination of the three special issues. The trial court did so, even though this Court explicitly held in Penry I that mental retardation and child abuse simply had no bearing on the questions presented to them, or if they did at all, it was as an *aggravating* factor.[4]

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[3] The Court's holding in Penry I was, as the Penry I Court stated, not novel or surprising. The Court held that it represented the logical and necessary enforcement of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982) which provide that a sentencer in a capital case must "not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. at 604; see Penry I, 492 U.S. at 319 (explaining that its holding created no new rule and was "dictated by Eddings and Lockett.").

[4] See, e.g., Rios v. State, 846 S.W.2d 310, 317 (Tex. Crim. App.1992) (*en banc*) ("Without more explanation, an instruction that baldly tells the jury it may consider evidence to be mitigating that seems either altogether irrelevant to the special issues, or relevant only in an aggravating sense, is likely in the context of [the Texas] scheme to confound rather than inform.").

This language brings the Penry violation around full-circle to what it was in Penry I. If, according to the court's instruction, a life sentence is only appropriate if there is a "negative finding to the issue under consideration," then Penry might as well not have had a Penry instruction, because the instruction only allows the jury to grant a life sentence if the honest answer to one of the three special questions is "no." That was always the case before Penry I. This is a direct violation of Penry I because Penry I quite clearly stands for the proposition that mental retardation evidence cannot be given mitigating effect under the three special issues. Again, just as the first time, there was no "vehicle," under the court's charge, for the jury to "express[] its 'reasoned moral response'" to the mitigating evidence. See Penry I, 492 U.S. at 328.

3. The Court of Appeals Failed to Recognize the Fundamental Flaw in the Instructions at Penry's Second Trial

The Court of Appeals for the Fifth Circuit held that the "instruction directed the jury to consider and give effect to any mitigating circumstances supported by the evidence by answering 'no' to one of the special issues if they felt a life sentence was appropriate."[2] App. A at 6. The Court of Appeals recognized, however, that the instruction "required the jury to give a negative answer to one of the three special issues in order for Penry to receive a life sentence." Id. (emphasis added).

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[2] In so holding, the Court of Appeals relied upon its decisions in Miller v. Johnson, 200 F.3d 274 (5th Cir.), cert. denied, __ S. Ct. __, 2000 WL 798485 (Oct. 2, 2000) and Emery v. Johnson, 139 F. 3d 191 (5th Cir. 1997), cert. denied, 119 S. Ct. 418 (1998). The cases relied upon by the majority are distinguishable for the reasons stated by Judge Dennis in his dissent. See App. A at 5.

The fundamental flaw with the reasoning of the majority is its failure to recognize that the instruction did not to allow the jurors to consider mitigating evidence beyond the scope of the three special issues. Therefore, the instruction contained the same constitutional infirmity as the instruction that required reversal by this Court in 1989.

> These instructions require the jury to consider and use only mitigating evidence relevant to the special issues, and permit the jury to decline to impose the death penalty only if that relevant mitigating evidence would cause the jury to change a "yes" to a "no." Therefore, the sentencing scheme used in Penry's second trial is subject to the same flaws pointed out by *Penry I*. It does not permit the jury to give effect to the mitigating evidence of retardation and abuse as a whole and beyond the scope of the special issues by declining to impose the death penalty despite its findings of "yes" to the three special issue questions. The jury's consideration of the mitigating evidence of mental retardation, organic brain damage and extensive child abuse is still shackled and confined within the scope of the three special issues. Therefore, the trial court failed to comply with the dictates of the Supreme Court and again deprived the jury of the ability to give full and complete effect to Penry's mitigating evidence of mental retardation, brain damage and child abuse.

App. A at 3-4 (Dennis, J., dissenting) (emphasis added).

B. This Court's Precedents Require Reversal Because There is a Reasonable Likelihood that the Jury Was Prevented from Considering Constitutionally Relevant Evidence

In determining if the instruction given at Penry's trial impermissibly restricted the jury's consideration of Penry's history of mental retardation and severe child abuse, this Court must determine "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant

evidence." Boyde v. California, 494 U.S. 370, 380 (1990). It has long been established that "[i]n death cases, doubts such as those presented here should be resolved in favor of the accused." Mills v. Maryland, 486 U.S. 367, 377 (1988), quoting, Andres v. United States, 333 U.S. 740, 752 (1948).

1. A Capital Jury May Not Be Precluded in Any Way from Considering Relevant Mitigating Evidence

This Court has consistently reaffirmed the fundamental principle that, in a capital case, "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." Weeks v. Angelone, ___ U.S. ___, 120 S. Ct. 727, 732 (2000); see also, Hitchcock v. Dugger, 481 U.S. 393, 394 (1987), Skipper v. South Carolina, 476 U.S. 1, 4 (1986), Eddings v. Oklahoma, 455 U.S. 104, 114 (1982), Lockett v. Ohio, 438 U.S. 586, 604 (1978). While the "State may structure the jury's consideration of mitigation" it may "not preclude the jury from giving effect to it." Weeks, 120 S. Ct. at 732.

This Court has held that the Constitution permits states to institute jury instructions that "shape and structure" a capital jury's consideration of mitigating evidence. Buchanan v. Angelone, 522 U.S. 269, 276 (1998). This "shaping and structuring" may not, however, impede the jury's consideration of mitigating evidence in any way. This Court's "consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence." Id. Therefore, there is a "need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination." Id, citing, Tuilaepa v. California, 512 U.S. 967, 971-73 (1994). Anything

less "does not permit the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases." Lockett, 438 U.S. at 605.

The instruction given at Penry's trial crossed the line between permissible "structuring" of the jury's ability to consider mitigating evidence and unconstitutional "restriction" of the jury's ability to consider such evidence. By tethering the jury's ability to give effect to the substantial mitigating evidence presented to the three special issues, the trial court unconstitutionally restricted the jury's ability to give effect to Penry's history of mental retardation and severe child abuse. Evidence of this type is unquestionably "'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'" Skipper, 476 U.S. at 4-5, quoting, Lockett, 438 U.S. at 604.

2. This Court's Recent Decisions Upholding Jury Instructions Demonstrate Precisely Why The Instruction Here Requires Reversal

Jury instructions approved by this Court in recent cases illustrate the constitutional infirmity in the instruction at issue here. In Buchanan, *supra*, the approved instruction told the jurors in plain language: "if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment." Buchanan, 522 U.S. at 272-73, see also, Id. at 273 n.1.[9] This Court approved this instruction because it "did not foreclose the jury's consideration of any mitigating evidence. By directing the jury to base its decision on 'all the evidence' the instruction afforded jurors an

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[9] In Buchanan this Court held that the Eighth Amendment does not require the court "to instruct the jury on its obligation and authority to consider mitigating evidence, and on particular mitigating factors deemed relevant by the State." 522 U.S. at 276.

opportunity to consider mitigating evidence." Id. at 277. This Court stated that "in contrast to the Texas special issues scheme in question in Penry, the instructions here did not constrain the manner in which the jury was able to give effect to mitigation." Id. (emphasis added, citation omitted).

By instructing Penry's jury that they could only "giv[e] effect to the mitigating evidence" if a life sentence was "reflected by a *negative finding to the [special] issue under consideration*" the trial court impermissibly "constrain[ed] the manner in which the jury was able to give effect to mitigation." Buchanan, 522 U.S. at 277. The constitutional infirmity in the Texas capital sentencing scheme pointed to by the Buchanan Court was not remedied by the trial court's instruction. In stark contrast to the instruction in Buchanan, which specifically told the jury to consider "all the evidence," Penry's jury was told that they could only give effect to mitigating evidence if "it was reflected by a negative finding to the issue under consideration." By so instructing the jury, the trial court did not cure the error that mandated reversal in Penry I, it exacerbated it, by expressly stating that the jury could not consider evidence not relevant to the three special issues. "[I]t was as if the trial judge had instructed [the] jury to disregard" a large part of the "mitigating evidence [Penry] proffered on his behalf." Eddings v. Oklahoma, 455 U.S. at 114.

In Weeks v. Angelone, *supra*, this Court again addressed the sentencing scheme at issue in Buchanan.[2] In addition to the instructions in Buchanan, the Weeks jury

[2] The issue in Weeks was "whether the Constitution is violated when a trial judge directs a capital jury's attention to a specific paragraph of a constitutionally sufficient instruction in response to a question regarding the proper consideration of mitigating circumstances." 120 S. Ct. at 729. This Court held that such a response by the trial judge does not violate the Constitution.

was told: "You must consider a mitigating circumstance if you find that there is evidence to support it." Weeks, 120 S. Ct. at 732 and 732 n.2. This Court relied upon the fact that the Weeks jury "received an explicit direction to consider mitigating evidence" in affirming the death sentence. Id. at 732. Rather than receiving an "an explicit direction to consider mitigating evidence," Penry's jury received an "explicit direction" that limited their consideration of mitigating evidence. Just as the "adequacy of the jury instructions" in Weeks "follow[ed] *a fortiori* from Buchanan," the inadequacy of the instructions here follows *a fortiori* from Penry I, Hitchcock, Skipper, Eddings and Lockett. Weeks, 120 S. Ct. at 732.

3. Mental Retardation is a Unique Mitigating Factor

Mental retardation is a unique mitigating factor in that it corresponds directly to a defendant's capacity to understand and control his behavior.[1] Society recognizes that mental retardation may diminish a defendant's moral blameworthiness. The Federal Government and eleven states currently have statutory prohibitions against the execution of the mentally retarded and three more states are currently working on similar statutes. Studies analyzing the behavior of juries show that since the reinstatement of the death penalty in 1976, relatively few mentally retarded defendants have been sentenced to death, and among those, the overwhelming majority of sentencing juries were not aware of the

[1] A brief on behalf of Amicus Curiae American Association on Mental Retardation *et al* will be filed describing the precise way in which mental retardation affects a person's ability to understand and control his behavior.

defendant's mental retardation.[9] In a number of these cases, prosecutors and sentencing jurors who subsequently learned about a particular defendant's mental retardation later indicated that they would not have sought or recommended the death penalty if they had full knowledge of the defendant's mental condition.[10] Data from the Capital Jury Project similarly reveal that juries in capital cases are almost twice as likely to return verdicts *against* the death penalty when the defendant is known to be mentally retarded.[11]

Hence the significance of Penry's mental retardation is enhanced because of overwhelming evidence demonstrating that he suffered the most horrific child abuse imaginable. Penry's mother believed that he was illegitimate and from the moment he was born she exhibited violent, venomous hatred towards him. Witnesses at the penalty phase of Penry's testified that they has witnessed a very young Penry suffer unspeakable abuse at the hands of his mother. Belinda Anderson, one of Penry's sisters, testified that Johnny was often "locked in his room" for periods of time "[f]rom eight hours on up." App. F at 1083. "About five days a week," Penry "would go without supper." Id. at 1084. Penry's mother "was ashamed of him, like she didn't love him or something, you know . . . she called him short little bastard, and mother-fucker and all kinds of filthy words" in a "hateful" tone of voice. Id. at 1086.

To Penry, being beaten by his mother "was practically an everyday affair." Id. As his sister stated: "It was a beating. Belt buckles, belts, it didn't matter, brooms, toy

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[9] Denis Keyes, William Edwards and Robert Perske, People with Mental Retardation are Dying, Legally, MENTAL RETARDATION, Feb. 1997 at 59.

[10] See id. at 61,62.

[11] See Report of the Capital Jury Project, at 2 & table 3 (Apr. 1997).

brooms, sticks and mop sticks, and anything she could lay her hands on, or her feet, stomp on him and stuff." Id. If Penry "look[ed] at [his mother] wrong or something[,] she would just threaten to scratch his little eyeballs out." Id. The beatings were triggered by "[a]nything. She could be drinking, could look at her wrong and didn't matter, he would say I love you, Mommy, Anything." Id. at 1087.

Penry's sister recounted the following story:

> Mama went into Johnny's room and Johnny had wet the bed again and Mama started running hot bath water, and you could see the steam rising up out of the shower. She drug him by the nape of his neck, like a little dog, by the shirt, back of his shirt, and she threw him in the bathtub and she held his head down with his face in the drain, saying, I ought to just drowned you, you little bastard.

Id. at 1088. She also remembered when Penry was forced to drink his own urine and eat his own feces:

> [H]e had to go and "pp" and he was banging on the door, wanting out to go to the bathroom. . .I think he was about five or six . . . But, it woke Mama up, him banging on the door, and Mama came in there, and he said, Mama I have got to "pp" and I am thirsty. So, she made him "pp" in the toilet and she made me go in there and watch. . . . She told Trudy to get her a cup, and she went and got it. I can't remember exactly how she came in, came in with the cup, but, she dipped it in the commode and made him drink it and she said that's all your getting for today, so, you better make it last. . . . She filled [the cup] up to the rim . . . I saw him drink it.
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> [When] he was about four or five . . . I had just had a nightmare and I wanted to crawl in bed with Mama, and Johnny was in the doorway, she was facing Johnny, with our heads up against the wall and she was facing Johnny in the doorway. . . He was kneeling on his knees . . . I walked by and I smelled a bad smell and I looked at Johnny and he was sitting there, he was on his knees eating his own bowel movement out of his drawers. . . .He was holding it and he

was looking everywhere but, in Mama's direction, he looked like he was really ashamed . . . She was sitting on the bed drinking a Dr. Pepper and watching him.

Id. at 1090-91.

Penry's other sister, Trudy Ross remembered similar incidents of unimaginable abuse inflicted on a small child:

> [W]hen . . . he was two, he was scolded [sic] in the sink, and then, there was another time, when he was about three or four, my mother made him stand on the sink in front of the heater, his legs facing the back of the heater, and I can remember blisters on the back of his legs. . . . I can remember being frightened and scared and Johnny screaming . . . She hit him with a belt, usually, the side with the buckle, and switches, anything that she could find, and slapped him, clawed him, hit him, and one time she broke a child's broom on him, she hit him with it. . . . [She] beat him often . . It seemed like he always had fresh marks on his back . . . I had witnessed her making him eat his own increment [sic] and also, drinking his own urine. . . . I can remember when we were out somewhere in the car and Johnny had used the restroom in a coke bottle, and she came out -- he was afraid to go outside of the car and do it, he was really afraid to do anything just, you know, what to do, he was always afraid, and she came out to the car, and she forced him to drink it, and she was real hateful and mean to him, and she even held the bottle and forced him to drink it. . . . I can remember my mother coming home, she was very enraged, she was home late . . . I remember her in there, and she was saying I was going to cut his privates off, so, you won't do this anymore, and she went and got a knife and was actually going to do it.

Id. at 1112 - 1119. Lucille Anderson, Penry's aunt, testified that Penry's mother "would sock him when he would be sitting in the high chair eating, right in the mouth. . . . [when Penry was] [j]ust a little baby in a high chair." Id. at 1165.

Studies and opinion polls have shown that the execution of the mentally retarded is viewed by the overwhelming majority of the population as immoral. These studies did not address persons who have endured the level of abuse detailed above in addition to being mentally retarded. Penry's jurors were not given a chance to give effect to their moral opposition to the execution of the mentally retarded or victims of devastating child abuse. As this Court noted in Penry I, mental retardation is relevant to the second special issue only as an aggravating factor. Penry I, 492 U.S. at 322-25. In light of the fact that the jurors were instructed that they could only give effect to the evidence of Penry's mental retardation and child abuse "at the time [they] answer[ed] the special issue," "there is a reasonable likelihood that the jury [ ] applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant evidence." Boyde, 494 U.S. at 380.

4. Mitigation Instructions May Not be Defined in Terms of Statutory Criteria

This Court has held that a jury instruction that ties the jury's consideration of mitigating evidence to factors enumerated in a statute is unconstitutional. In Hitchcock v. Dugger, 481 U.S. 393 (1987) this Court reversed a death sentence because "the sentencing judge assumed" that Florida law "prohibit[ed] the sentencing jury and judge from considering mitigating circumstances not specifically enumerated in the statute" and "instructed the jury accordingly." 481 U.S. at 396-97.[12] The instruction given to Penry's jury drew the jurors back to the special issues in three separate places. By limiting the jury's consideration of mitigating factors to only those factors relevant to the three, narrow, special

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[12] As here, the statute at issue was subsequently revised to allow the jury to consider all relevant mitigating evidence. Id. at 397.

issues, the instruction improperly prohibited the jury from considering mitigating factors not relevant to those issues. This Court's "cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid." Id. at 399.[13]

C. An Instruction that Requires Jurors to Render an Untruthful Verdict in Order to Give Effect to Mitigating Evidence is Unconstitutional

The Court of Appeals held that Penry's jury was perfectly able, under the dictates of Penry I, to "give effect" to Penry's mitigating evidence: all they had to do was violate their oath as jurors and render a false verdict. App. A at 6. (jurors could "give effect to any mitigating circumstances supported by the evidence by answering 'no' to one of the special issues of they felt a life sentence was appropriate"). In other words, the trial court's confusing instruction may be read as saying that, to render a life verdict, the jury could answer any one of the special questions "no," even if the question legitimately and unambiguously called for a "yes." At best, this instruction left Penry's jury with a Hobson's choice: answer the questions truthfully -- and violate Penry's constitutional rights -- or disregard the questions on the verdict sheet -- and violate their oath as jurors.

Every juror in Texas is required to swear the following oath:

> You and each of you do solemnly swear that in the case of the State of Texas against the defendant, you will a *true* verdict render according to the law and the evidence, so help you God.

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[13] The mitigating evidence presented in Hitchcock included evidence that "as a child petitioner had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that petitioner had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that petitioner had been a fond and affectionate uncle to the children of one of his brothers." 481 U.S. at 397.

Tex. Crim. Pro. Code Art. 35.22 (West 1997), App. L.

The jurors were never clearly told that they could ignore this oath -- and such an instruction, even if given, would not be constitutionally permissible. A jury must be able to spare a capital defendant's life without betraying its obligation to render a "true verdict."

In Roberts v. Louisiana, 428 U.S. 325, 335 (1976) this Court held that a similarly flawed instruction was a constitutionally inadequate vehicle for dispensing mercy. In Roberts, the jury was instructed to consider crimes other than first degree murder "even if there [was] not a scintilla of evidence to support the lesser verdicts." Roberts, 428 U.S. at 334. Similarly, Penry's jury was instructed to answer "no" to one of the special issues even if there was "not a scintilla of evidence" to support such an answer. As this Court held in Roberts:

> This responsive verdict procedure not only lacks standards to guide the jury in selecting among first-degree murderers, but it plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate. There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the [law].

428 U.S. at 334-35. "The Eighth Amendment . . . simply cannot tolerate the reintroduction of a practice so thoroughly discredited." Id. at 336; see also Beck v. Alabama, 447 U.S. 625, 644 (1980) (jurors "should not be expected to make such lawless choices").

* * * * *

For all of the above reasons, Penry's death sentence is unconstitutional.

> The sentencing scheme and instructions adopted by Texas in Penry's second trial . . . do not satisfy the constitutional

> requirements described in *Penry I*. The jury was not clearly and directly instructed that it could consider and give effect to the mitigating evidence of Penry's mental retardation, organic brain damage and abused background as a whole and beyond the scope of the special issues by declining to impose the death penalty. Texas did not replace its sentencing scheme with one which puts "before the jury all sympathetic factors bearing upon the defendant's background and character, and the circumstances of the offense, so that the jury may decide without further guidance whether he 'lacked the moral culpability to be sentenced to death.'"

App. A at 3 (Dennis, J., dissenting), quoting, Penry I, (Scalia, J., concurring in part and dissenting in part). Because the jury's ability to give effect to the substantial mitigating evidence presented was "still shackled and confined within the scope of the three special issues," Penry's jury was deprived of "the ability to give full and complete effect to Penry's mitigating evidence of mental retardation, brain damage and child abuse." Id.

Penry, a mentally retarded man who endured the most horrific child abuse imaginable, "has been caught in a web spun of words and logic that, in the end, has deprived [him] of his constitutional rights, a deprivation that may cost him his life." May v. Collins, 904 F.2d 228, 234 (1990) (Reavley, J. and King, J., concurring). The decision of the Court of Appeals should be reversed.

II.

THE ADMISSION OF THE PEEBLES REPORT VIOLATED PENRY'S FIFTH AMENDMENT RIGHTS UNDER *ESTELLE* V. *SMITH*

A. The Peebles Report and Its Use at Penry's Trial

In 1977, while Penry was in custody on an unrelated rape charge, the court ordered that he be examined by a psychiatrist to determine his competence to stand trial. This examination was conducted by Dr. Peebles. Dr. Peebles' report was admitted into evidence at Penry's subsequent capital trial over defense objection on Fifth Amendment grounds. App. G at 1429-31. The report described the court-ordered competence examination Dr. Peebles had conducted of Penry in 1977. The report included a finding that Penry would be a danger in the future if released. See Peebles Report, App. K at 2, see also, App. J at 2946-47. Since Penry was not in custody on a capital charge, it is not possible that he received the constitutionally-mandated warnings concerning the possible use of this examination at the punishment phase of a future capital trial. Penry's statements to Dr. Peebles cannot therefore be deemed voluntary under Estelle v. Smith, 451 U.S. 454 (1981).

The Peebles report was a predominant theme of the prosecution's case. Not only was the report itself admitted into evidence; each of the three experts put forth by the state to testify as to Penry's future dangerousness relied upon it. The prosecutor believed the Peebles report to be so powerful that he relied on it in his closing argument to paint Penry as an incurably violent man:

> [Penry] was examined by Dr. Felix Pebbles [sic] who found that he was sane. He knew the difference between right and

> wrong, and he was competent to stand trial, but Dr. Pebbles [sic] went on and made an additional finding that was *really out of the ordinary, and I have never seen this in any kind of a report*, he just added it, he said that it is my further professional opinion, that if Johnny Paul Penry were released from custody, that *he would be dangerous to other persons*.

App. J at 1946-47 (emphasis added).

B The Holding of Estelle

In Estelle this Court held that the use of a defendant's compelled statements violated the Fifth Amendment. In that case, the defendant had been subjected to a court-ordered psychiatric examination for the purpose of determining his competency to stand trial. The results of the examination were later used against him at the sentencing phase of the defendant's capital trial by the state as evidence of his future dangerousness. This Court held that this testimony "violated [his] Fifth Amendment privilege against compelled self-incrimination because respondent was not advised before the pretrial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at a sentencing proceeding." Estelle, 451 U.S. at 461. Here, Penry's Fifth Amendment rights were similarly violated.

C. The Court of Appeals Erroneously Denied Penry's Claim that the Admission of the Peebles Report Violated His Fifth Amendment Rights on the Ground that the Fifth Amendment Did Not Apply Because Penry's Counsel Had Requested the Examination

The use of the Peebles report, over the defense's objection on Fifth Amendment grounds, was a clear violation of Penry's constitutional rights. In denying Penry's claim relating to the Peebles report, the Court of Appeals held:

> The Texas Court of Criminal Appeals found no Fifth Amendment violation because Penry's attorney had requested the examination, thus Dr. Peebles was acting as an agent of the defense, not of the state in conducting his examination. We cannot say that the court's conclusion was unreasonable or contrary to Supreme Court precedent.

App. A at 12-13.

This decision is, so far as we are aware, the first to hold that the protections of Estelle do not apply to competence examinations requested by the defense.

The Fifth Circuit itself and several other circuits had previously held to the contrary. In Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981), the Fifth Circuit held that where the psychiatrist "had been appointed by the state trial court to conduct the examination . . . the custodial interrogation was conducted *by an agent of the state*." Id. at 699 (emphasis added). The Battie court held further that:

> the fact that the defense requested the examination does not obviate the necessity for giving the Miranda warnings where the defense did not request such an examination on the question of future dangerousness. . . . The fact that defense counsel initially requested an examination to determine the petitioner's competency and sanity does not render Miranda inapplicable.

655 F.2d at 702-03. Other Courts of Appeals have followed the reasoning of the Fifth Circuit in Battie. See, Hargrave v. Wainright, 804 F.2d 1182, 1191 (11th Cir. 1986) (following Battie and stating that it is "irrelevant that it was petitioner who requested the competency examination conducted by Dr. Sylvester."), op. vacated and rehearing granted on other grounds, 809 F.2d 1182 (11th Cir. 1987); Pierre v. Shulsen, 802 F.2d 1282 (10th Cir. 1986) (discussing Estelle in context of competence examination conducted "at the request of [defendant's] trial counsel;" claim was held to be procedurally barred). District

Court precedent is to the same effect. Tuggle v. Thompson, 854 F. Supp. 1229, 1233, 1235, 1243 (W.D. Va. 1994) ("Petitioner's trial counsel [ ] filed a motion for the appointment of a mental health professional to examine the petitioner's sanity at the time of the offense and his competence to stand trial. The court granted this motion and ordered state mental health professionals to examine petitioner with respect to these two issues. . . . [T]he prosecutor called [the doctor] and he was permitted to testify at trial that there was a high probability that Tuggle would commit criminal acts of violence in the future. In his closing sentencing argument, the Commonwealth's Attorney relied heavily on [the doctor's] testimony. . . . Just as in Estelle v. Smith, [defense counsel] had no knowledge of the state's intent to trap their client on the 'future dangerousness' issue . . . the petitioner's petition for writ of habeas corpus will be granted on this basis "), rev'd on other grounds, 57 F.3d 1356 (4th Cir.), vacated and remanded on other grounds, 516 U.S. 10 (1995).[14]

The Court of Appeals' holding that, where a competence examination was requested by defense counsel, the court-appointed psychiatrist is not an "agent of the state" is inconsistent with Estelle itself. In Estelle, this Court stated:

> That respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant or prosecuting attorney is immaterial. When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting.

Estelle, 451 U.S. at 467 (emphasis added). It was the use of the doctor's testimony by the state that made him an agent of the state for Fifth Amendment purposes. The state's use of the Peebles report had the same effect here. Indeed, here, the Estelle error was compounded by the fact that Dr. Peebles did not testify, and only his report was admitted. Therefore, he was not subject to cross-examination by the defense.

This Court's decision in Smith v. Murray, 477 U.S. 527 (1986), also demonstrates the error of the Court of Appeals' holding. In Smith v. Murray, the petitioner had been "examined by a psychiatrist appointed by the court at the request of his counsel." 477 U.S. at 527. The psychiatrist testified against the petitioner at the sentencing phase of his capital trial. Id. While the majority held that the claim was procedurally barred, Justice Stevens, in dissenting on the procedural bar issue, stated that "Chief Justice Burger's opinion for the Court in Estelle v. Smith . . . makes it absolutely clear that the introduction of this evidence by the prosecution at the sentencing stage violated the Fifth Amendment." 477 U.S. at 551 (Stevens, J., dissenting, citation omitted). The fact that the examination had been requested by the defense was not mentioned by either the majority or the dissent. The clear implication of Smith is that the protections of Estelle apply to psychiatric examinations

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[14] On rehearing, Penry argued that the decision of the Court of Appeal was in conflict with circuit precedent. In denying the motion for rehearing, the Court of Appeals relied upon Schneider v. Lynaugh, 835 F.2d 570 (5th Cir. 1988). But Schneider was not a capital case and involved only the exception to Estelle upheld in Buchanan v. Kentucky, 483 U.S. 402 (1987). Buchanan held that "if a defendant requests [a psychiatric] evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. . . .; this limited rebuttal purpose does not constitute a Fifth Amendment violation." 483 U.S. at 422-24. The "rebuttal" exception to Estelle is not applicable to the Peebles report, which confirms the main thrust of Penry's plea for a life sentence -- that Penry is mentally retarded. The Court of Appeals did not hold that the Buchanan exception applied. See App. K at 2.

requested by the defense. The Court of Appeals' holding to the contrary is a departure from precedent that this Court should now correct.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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